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No. 655

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

CHRYSLER MOTORS CORPORATION and CHRYSLER CORPORATION, corporations of the State of Delaware,

Petitioners,

v.

BUONO SALES, INC., REZZA MOTORS, INC., LICCARDI MOTORS, INC., ENGLEWOOD MOTORS, INC., MILLBURN MOTOR SALES CO., LICCARDI MOTOR SALES, INC., RICHARD MOTORS, INC., LABRIOLA MOTORS, INC. and MAIN AUTO SALES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THIRD CIRCUIT

Chrysler Motors Corporation and Chrysler Corporation pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, in the above-entitled cases.

Opinions Below

The opinion of the District Court, printed in Appendix A hereto, *infra*, p. App. A1, is reported in 239 F. Supp. 839. The opinion of the Court of Appeals

en banc, printed in Appendix B hereto, *infra,* p. App. B1, with a dissenting opinion, *infra,* p. App. B17, is not yet reported.*

Jurisdiction

The judgments of the Court of Appeals were entered on July 14, 1966 and are printed in Appendix C hereto, *infra,* p. App. C1. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. The court below held, reversing the District Court by a five to three vote, that petitioners, by discontinuing in good faith and for pressing and valid business reasons the production of one make of automobile sold under a standard automobile dealer agreement between petitioners and more than 1600 dealers, had committed a breach of the agreement. The decision is of substantial importance in terms of judicial administration because it is likely to encourage the institution of numerous similar dealer suits based on the same discontinuance of production.

The first question presented is whether this holding, which concededly depended upon the interpretation of the law of a state outside the circuit of the court below and which is in conflict with the law of that state, should be permitted to stand.

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* Pursuant to Rule 21(3) of this Court, certified copies of the appendices filed with the Court of Appeals have been filed herein. In this petition, Plaintiffs' Appendix is referred to as "P. App." and Defendants' Appendix as "D. App." followed by the appropriate page number.

2. The court below also held, again reversing the District Court by a five to three vote, that the mailing of a promotional brochure by one of petitioner's divisions soliciting sales and service business for that division's dealers was a tortious interference with the business of dealers of another division, despite the absence of any allegation or proof of malice or misrepresentation.

The second question presented is whether this holding, which is in conflict with applicable state law, and which again is of substantial importance in terms of judicial administration because it is likely to encourage the institution of numerous suits by the more than 1600 dealers situated comparably to respondents, should be permitted to stand.

Statement

Petitioners manufacture and distribute automobiles.* Respondent Buono Sales, Inc., (hereafter "respondent") is a retail automobile dealer.** Respondent at all relevant times sold and still sells petitioners' Plymouth and Valiant automobiles, and at one time also sold petitioners' DeSoto, all pursuant to standard dealer agreements with petitioners.

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* The parties below stipulated that the separate corporate entities of Chrysler Corporation and Chrysler Motors Corporation were to be disregarded in this case. (P. App. 27a) Accordingly, they will individually and collectively be referred to herein as "petitioners".

** Each of the respondents was plaintiff in a separate action against petitioners. Only the case of respondent Buono Sales, Inc., was actually tried, all parties having stipulated that judgment in each of the cases would be entered in accordance with that of the *Buono* case. Accordingly, petitioners' statement of the case is directed to the facts in the *Buono* record.

During the late 1950's petitioners and respondent both suffered a drastic decline in DeSoto sales, caused by a shift of consumer interest to lower priced and foreign automobiles. The magnitude of the decline from petitioners' standpoint is shown by the fact that new DeSoto registrations fell from 118,062 in 1955 to less than one-fifth of that number—23,063—in 1960 (D. App. 32b). Respondent's DeSoto sales experience during this period was almost identical. Whereas in 1955 it sold more than 60 DeSotos, in 1960 it sold only 12, although its sales of Plymouths were greater in the latter year than in the former (D. App. 38b).

Petitioners met the trend to smaller cars by introducing, in 1959, the compact Valiant which they made available to their DeSoto dealers (P. App. 50a). On November 8, 1960, petitioners determined that it was no longer economically feasible to continue to manufacture the DeSoto, and decided to discontinue production (P. App. 47a-50a). They promptly communicated this decision to their more than 1600 DeSoto dealers, including respondent, by telegram and letter dated November 18, 1960 (P. App. 99a-102a). Because substantially all of petitioners' DeSoto dealers, including respondent, also handled petitioners' Plymouth and Valiant automobiles, the result of the discontinuance was not to put dealers out of business but rather to enable them to turn their marketing efforts to more successful products (P. App. 50a-51a).

At the time of discontinuance of production of the DeSoto there was in effect between petitioners and respondent a written "DeSoto-Plymouth Direct Dealer Agreement" (P. App. 20a). That agreement, which

provides that it is to be construed and interpreted according to Michigan law, contains no express provision requiring petitioners to continue to produce the DeSoto. On the contrary, the agreement (par. 10) provides that all orders from dealers are subject to petitioners' acceptance and that petitioners will not be liable for delay or nondelivery of products ordered, and (par. 20) that petitioners, without notice, may "discontinue any models, lines or body types"; "may revise, change, or modify their construction or classification"; and "may declare obsolete or discontinue any or all parts, accessories or other merchandise."

In February 1962 respondent brought suit against petitioners in the United States District Court for the District of New Jersey charging that petitioners had committed a breach of the standard dealer agreement by discontinuing production of the DeSoto. At the trial respondent introduced no evidence in support of this contention beyond copies of the agreement and the communications from petitioners announcing the discontinuance of DeSoto production, whereas petitioners presented testimony as to trade usages and the historical and commercial context of the agreement and of the decision to discontinue production. The District Court held that in light of the terms of the entire agreement and the evidence adduced at trial no breach had occurred.

On appeal the case was initially argued before three judges of the Court of Appeals for the Third Circuit. Before any decision, however, it was set down, on the Court's own motion, for reargument before the court sitting *en banc*. Following reargu-

ment, a majority of the full court rejected the decision of the District Court, and held that petitioners had committed a breach of the standard agreement by discontinuing production of the DeSoto, and that judgment on the issue of liability should accordingly be entered in favor of respondent.*

In response to petitioners' contention that a decision of the highest court of the State of Michigan, whose law concededly controls interpretation of the contract, was dispositive in their favor, the majority simply asserted, without explanation, that "that decision, for whatever it may be worth, has no application to the admitted facts before us." The three dissenting judges, in contrast, stated that the Michigan decision referred to, *McClintock Co.* v. *Truxel Sales & Service,* 297 Mich. 284, 297 N.W. 493 (1941), "would appear to support Paragraph 10 [of the agreement], even standing alone, as being dispositive of the problem adversely to Buono Sales," and went on to demonstrate the controlling nature of that decision.

In its complaint respondent also charged petitioners with "tortious interference" with its business. The sole basis of this charge was a single sentence in a promotional brochure (D. App. 24b-26b) distributed in early 1961 by petitioners' Dodge Division to owners of the 1956-1959 model DeSoto, stating that "He [the Dodge dealer] is best qualified to give your De Soto the genuine factory-approved service it deserves." No malice or misrepresentation in connection with this

* The court divided 5-3, Judges McLaughlin, Staley, Kalodner, Ganey and Freedman voting for reversal, and Judges Forman, Hastie and Smith for affirmance.

statement was alleged or proved. Indeed, respondent again offered no testimony in support of its claim. The District Court, relying on decisions of the highest court of New Jersey explicitly recognizing that "a trader may lawfully engage in the sharpest competition with those in a like business, * * * by representing his own goods to be better * * * than those of his competitor", held the statement in question to be not actionable.

Again the Court of Appeals reversed, by the same five to three vote. The majority failed to find that the statement referred to was malicious, wanton, false or fraudulent, but nevertheless held it unlawful. The dissenting judges, on the other hand, stating that the only relevant right under New Jersey law was to be "free from malicious and wanton interference with a business relationship and prospective economic advantage, an act for which Buono Sales does not charge Chrysler," voiced their agreement with the District Court's disposition of this issue as well.

Reasons for Granting the Writ

Rule 19(1)(b) of this Court's Rules provides that one of the reasons that justifies the granting of a writ of certiorari is that "a court of appeals * * * has decided an important state or territorial question in a way in conflict with applicable state or territorial law * * *." In the implementation of this Rule this Court has not hesitated in appropriate circumstances to issue the writ to review determinations of state law by federal courts even when the importance of the issue lay simply in the injustice which the manner of its resolu-

tion below had inflicted upon one of the parties to the particular suit. See, *e.g., Gibson* v. *Phillips Petroleum Co.*, 352 U.S. 874 (1956); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437 (1959).

The present case presents a far more exigent situation for exercise of this Court's discretionary jurisdiction. The erroneous determinations below do not merely inflict an injustice upon petitioners in this particular litigation. Unless corrected they will have a far broader impact, by encouraging the institution of identical suits by an indeterminable number of the more than 1600 former DeSoto dealers throughout the country whose situation is comparable to that of respondent. Already the decision of the Court of Appeals has resulted in public exhortations to those dealers to assert such claims,* and in the institution of dealer suits in three different jurisdictions. Particularly at a time when the congested condition of court dockets has been the subject of deep concern to both judiciary and bar, sound judicial administration requires that a demonstrably erroneous decision not be permitted to become a breeding ground for widespread litigation. Compare *Alcoa Steamship Co.* v. *United States*, 338 U.S. 421, 423 (1949), where this Court issued the writ to provide guidance with respect to the disposition of a large number of separate but related claims.

In holding that under Michigan law the standard dealer agreement prevented petitioners from discontinuing production of an automobile whose declining sales showed conclusively that it was no longer ac-

* See Motor News Analysis, August, 1966, p. 3.

cepted by the purchasing public, the court below ruled contrary to a decision of the Michigan Supreme Court on facts so strikingly similar as to offer no room for even the most inventive distinctions.

In that case, *F. H. McClintock Co.* v. *Truxel Sales & Service,* 297 Mich. 284, 297 N.W. 493 (1941), the Michigan court had occasion to construe a contract for the supply and sale of DeSoto and Plymouth automobiles between a "direct dealer," or wholesaler, and a retail dealer. The agreement contained a provision stating that "direct dealer shall have the right to accept, in whole or in part, any or all orders received, and shall not be liable for any loss or damage resulting from its failure to ship or deliver goods ordered." Upon the direct dealer's refusal to continue to supply any products to the retail dealer the latter sued for breach of contract. The Michigan Supreme Court held that the quoted language necessarily provided a complete defense.

In the instant case, paragraph 10 of the standard agreement provided in pertinent part that "all orders are subject to acceptance by DESOTO-PLYMOUTH" and that "DESOTO-PLYMOUTH will not be liable for delay or non-delivery of products ordered." Petitioners submit that no meaningful distinction can be drawn between this language and that involved in *McClintock.* And this Court should not permit the court below to avoid the effect of *McClintock* by any insubstantial and fanciful distinction, just as it struck down a like effort by a federal court of appeals to avoid the command of *Erie* in *Stoner* v. *New York Life Ins. Co.,* 311 U.S. 464, 468 (1941).

With respect to the other holding of the court below, that the simple statement "He [the Dodge dealer] is best qualified to give your De Soto the genuine factory-approved service it deserves," was a tortious interference with respondent's business, the conflict with controlling state law is no less egregious. Controlling decisions of the highest New Jersey court, including authority cited by the majority in support of their holding, explicitly recognize that a trader's claim that he is better than his competitors is *not* unlawful. See *e.g., Louis Kamm, Inc.* v. *Flink,* 113 N.J.L. 582, 175 A. 62, 67 (E. & A. 1934); *Van Horn* v. *Van Horn,* 56 N.J.L. 318, 28 A. 669, 670 (E. & A. 1894). Until this holding of the court below is set aside the federal courts inferior to the court below will be obliged to apply as the law of New Jersey a rule which in fact finds not even remote support in that law, and which outlaws the most conventional commercial conduct.

It is important to note that this Court's frequently stated policy of giving special weight under certain circumstances to the views of the inferior federal courts on questions of state law in no way militates against review here, and indeed constitutes an independent and additional reason for review of the holding on the issue of tortious interference. Precisely stated, the policy referred to dictates deference to state law determinations by federal judges when, and only when, those judges are from the bar of the state whose law is at issue. See, *e.g., Ragan* v. *Merchants Transfer & Warehouse Co.,* 337 U.S. 530, 534 (1949); *Bernhardt* v. *Polygraphic Co.,* 350 U.S. 198, 204 (1956). It is thus evident that the policy has no application to the first question on which review is

here sought. That question is concededly one of Michigan law, and no member of the bench below is a product of the Michigan bar.

With respect to the second question, on the other hand, application of the policy would result not in letting the determination of the Court of Appeals stand but rather in a reversal of that determination. For of the nine judges (including the district judge) who have in this case ruled as to the law of New Jersey on tortious interference, only four are from the New Jersey bar, and of these four three have declared that law to be precisely the opposite of what a majority of the Court of Appeals has in this case held it to be.*

CONCLUSION

For the foregoing reasons petitioners respectfully submit that their petition for a writ of certiorari should be granted.

Respectfully submitted,

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* It is additionally noteworthy that two of these three—Judges Forman and Smith—are former Chief Judges of the United States District Court for the District of New Jersey.

Appendix A—Opinion of District Court

OPINION

AUGELLI, *District Judge*:

This action was tried to the Court, sitting without a jury, on the issues of liability under the first and fourth counts of the complaint, which allege, respectively, breach of contract, and tortious interference with business and prospective economic advantage. Counts two, three and five have been abandoned; and it has been stipulated that if the Court should make a finding of no liability on count one of the complaint, the remaining count six, based on the Automobile Dealers' Day in Court Act, 15 U.S.C.A. § 1221 et seq., would also be abandoned.

Plaintiff Buono Sales, Inc., is an automobile dealer located in Hawthorne, New Jersey. Defendant Chrysler Corporation is in the business of manufacturing automobiles. Defendant Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation, and is engaged in the business of selling to dealers automobiles manufactured by the parent corporation. It has been stipulated that for the purposes of this action, "the separate corporate entities of the two defendants are to be disregarded and that any acts of the defendant Chrysler Corporation shall be deemed to be the acts of the defendant Chrysler Motors Corporation." In view of this stipulation, and unless otherwise stated, the defendants, and either of them, will hereinafter be referred to as "Chrysler".

Jurisdiction is based on diversity of citizenship and allegation of the requisite amount in controversy,

28 U.S.C.A. § 1332. In addition, count six is brought under 15 U.S.C.A. § 1222.

From 1935 to 1959, plaintiff was a dealer for the DeSoto and Plymouth automobiles manufactured and sold by Chrysler. In 1959, plaintiff also became a dealer for the Valiant automobile, which was newly introduced by Chrysler in that year. On November 18, 1960, Chrysler discontinued production of the DeSoto. Thereafter, plaintiff continued as a Plymouth and Valiant dealer, and at the present time still operates as such.

The discontinuance of the DeSoto automobile on November 18, 1960, was announced by Chrysler on that date to all of its more than 1600 DeSoto dealers, including plaintiff. In the previous five year period, DeSoto sales had suffered an extremely serious decline due to the shift in public demand from the middle priced car field, which included DeSoto, to the lower-priced and foreign car field. This loss was compounded by recurring rumors in the trade that production of the DeSoto would soon be discontinued. New car registrations of DeSotos in the United States dropped from 118,062 in 1955 to 23,063 in 1960. Plaintiff's own car sales of the DeSoto automobile, which in 1955 and 1956 had accounted for over 50% of its total new car sales, accounted for only 12 out of a total of 89 new cars sold by it in 1960. Under these circumstances, Chrysler would appear to have had sound bona fide business reasons for withdrawing the DeSoto from the market.

On November 18, 1960, plaintiff's business relationship with Chrysler was covered by a "DeSoto-Ply-

mouth Direct Dealer Agreement" ("Agreement"), which had been in effect since June 10, 1957, and is still in force except as affected by the discontinuance of the DeSoto automobile. The Agreement provides that it is to be interpreted and construed according to the laws of the State of Michigan. It is plaintiff's contention in count one of its complaint that Chrysler's discontinuance of the DeSoto automobile constituted a breach of this Agreement. Chrysler, on the other hand, in addition to other reasons advanced to justify its action, takes the position that the Agreement, by its very terms, gave it the right to discontinue the DeSoto without notice, and without any obligation to plaintiff. The problem thus boils down to one of interpretation and construction of the Agreement in question.

It is hornbook law that the primary inquiry in cases involving the interpretation and construction of contracts is the ascertainment of the intention of the parties, and that such intention is to be gathered from the language used in the instrument. *Thomas* v. *Jewell*, 300 Mich. 556, 2 N. W. 2d 501 (1942); *Sheldon-Seatz, Inc.* v. *Coles*, 319 Mich. 401, 29 N. W. 2d 832 (1947); *Moulton* v. *Lobdell-Emery Mfg. Co.*, 322 Mich. 307, 33 N. W. 2d 804 (1948). If the language employed is clear and unambiguous, the contract must be enforced as written, without reference to extrinsic facts. *Harrington* v. *Inter-State Business Men's Accident Ass'n*, 210 Mich. 327, 178 N. W. 19 (1920); *Indemnity Insurance Co.* v. *Geist*, 270 Mich. 510, 259 N. W. 143 (1935). But if the terms of a written contract are uncertain, ambiguous, and susceptible of more than one

interpretation, parol evidence may be introduced to resolve the issue. *Weber* v. *Cole,* 323 Mich. 485, 35 N. W. 2d 396 (1949). See also Wigmore, *Evidence,* Vol. 9, Sec. 2556 (3rd Ed. 1940).

The Agreement in this case contains no express provision imposing any obligation on Chrysler to produce or continue the production of DeSoto automobiles. Indeed, it may be implied from paragraph 10 of the Agreement[1], that Chrysler would not be obligated to deliver any automobiles to plaintiff. The Agreement does provide, in paragraph 21, for a termination by either party upon the happening of certain events, but admittedly none of these events have taken place.

From a reading and consideration of the Agreement as a whole, it is apparent that a resolution of the issue under count one of the complaint revolves around the meaning to be ascribed to certain words used in paragraph 20 of the Agreement. That paragraph, in pertinent part, provides that:

> "[Chrysler] at any time may discontinue any models, lines or body styles and may revise, change or modify their construction or classification. * * *[Chrysler] at any time may declare obsolete or discontinue any or all parts, acces-

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[1] Paragraph 10, in part, provides:

"All orders are subject to acceptance by [Chrysler], which may be in whole or in part. [Chrysler] will use its best efforts to fill accepted orders for DeSoto * * * passenger cars and DeSoto * * * passenger car parts and accessories; however, [Chrysler] will not be liable for delay or nondelivery of products ordered nor will anything in this agreement obligate [Chrysler] to deliver to [plaintiff] any particular number of new DeSoto * * * passenger cars."

sories and other merchandise. [Chrysler] may act under this Paragraph 20 without notice and * * * without any obligation to [plaintiff] by reason of [plaintiff's] previous purchases."

Prior to the trial of this action, both sides moved for summary judgment under count one of the complaint, each contending that the Agreement was clear and unambiguous, that no further proofs were required and that summary judgment should be awarded as a matter of law. The main target on the cross-motions for summary judgment was paragraph 20 of the Agreement, with particular reference to the meaning of the words "models", "lines", and "body styles".

Both motions were denied because the Court was of the opinion that the words "model", "lines", and "body styles" were somewhat ambiguous or at least subject to different interpretations in the context in which they were used. The cross-motions for summary judgment, in the Court's view, presented a factual issue as to the meaning of the quoted words in the automobile industry and in the Agreement. While it is true that the construction of written instruments belongs to the Court as a matter of law, it is nevertheless the function of the trier of the facts to consider evidence of the surrounding circumstances relating to the meaning of ambiguous words or words with a particular commercial meaning attached by usage. See Wigmore, *Evidence,* Sec. 2556, supra; *Distillers Distributing Corp.* v. *Sherwood Distilling Co.,* 180 F. 2d 800 (4 Cir. 1950); *Ricker* v. *United*

States, 115 F. Supp. 193 (Ct. Cl. 1953); *Home Insurance Co.* v. *Exchange Lemon Products Co.,* 126 F. Supp. 856 (S.D. Calif. 1954), aff'd 235 F. 2d 558; *Fidelity Trust Co.* v. *American Surety Co. of New York,* 268 F. 2d 805 (3 Cir. 1959).

At the trial of the action, plaintiff rested its case on count one of the complaint after putting in evidence the Agreement, a telegram by Chrysler dated November 18, 1960 advising plaintiff of the discontinuance of the 1961 DeSoto, and Chrysler's letter of the same date stating reasons for the discontinuance. In addition to the foregoing, plaintiff relied on the briefs submitted in connection with its summary judgment motion. Chrysler, on its claimed right to discontinue production of the DeSoto automobile under paragraph 20 of the Agreement, introduced evidence bearing on the meaning intended by the language used in that paragraph.

There was testimony, from which the Court finds, that as used in the automobile industry, and as understood by the parties to the Agreement, the word "model" means and refers to automobiles identified by a particular year; that the word "line", though susceptible of more than one meaning, is generally used in the industry to designate a group of automobiles sold under the same trade name, such as the Plymouth, Dodge, Valiant or DeSoto[2]; and that the term "body style" means and refers to a particular type of automobile, such as a two-door, four-door,

[2] There was also marked in evidence a questionnaire completed by plaintiff in the course of business in which the DeSoto automobile was designated as a "line" by plaintiff.

hardtop or convertible. Accepting, as the Court does, these meanings and definitions of the quoted words, it is thus clear that Chrysler had the right, under paragraph 20 of the Agreement, to discontinue on November 18, 1960, the 1961 model of the DeSoto line which had been introduced in October, 1960, in two body styles.

The Court is also satisfied from a consideration of the entire Agreement, in light of the evidence adduced at the trial, that no contract in perpetuity was intended; that plaintiff, an automobile dealer of many years standing, was familiar with the ever changing conditions in the automobile market; that to plaintiff's knowledge it is not unusual, as consumer tastes and demands change, for manufacturers to cease production of a particular make of automobile; and that it was in contemplation of the parties that any automobile covered by the Agreement might be withdrawn from the market. Indeed, prior to 1935, plaintiff had been a dealer for various makes of automobiles, including Jewett, Gardiner, Elcar, Oakland and Pontiac, the first four of which have long since disappeared from the market.

Under all of the circumstances, the Court finds that Chrysler was justified, under paragraph 20 of the Agreement, in discontinuing production of the DeSoto automobile, and that no liability attached to it by reason of such action. It follows, and the Court so determines, that Chrysler is not liable to plaintiff for breach of the Agreement. This conclusion makes it unnecessary for the Court to consider other reasons advanced by Chrysler as to non-liability under count one of the complaint.

Chrysler must also prevail on count four of the complaint.

In early 1961, a certain nine-panel brochure was mailed by the Dodge Division of Chrysler to owners of 1956, 1957, 1958 and 1959 DeSoto automobiles in plaintiff's sales locality.[3] The Brochure was essentially a promotional effort to increase the sale of the 1961 Dodge automobile, and was addressed specifically to the DeSoto owner, who was told on the front panel: "The Key To Your DeSoto Is The Key To The Best Deal You Can Ever Make!" Another panel of this same brochure consisted of a letter from the General Manager of the Dodge Division addressed: "Dear DeSoto Owner". In addition to urging the purchase of Dodge automobiles, the letter also contained a statement that the Dodge dealer "is best qualified to give your DeSoto the genuine factory-approved service it deserves."

It is plaintiff's contention that the mailing of this brochure constituted a tortious interference with its business and prospective economic advantage. At the time of the mailing, plaintiff was not a Dodge dealer, but its business did include the servicing of DeSoto automobiles. Thus, in effect, plaintiff's former DeSoto customers were being invited by Chrysler's Dodge Division to take their future business, both new car and service, to other dealers who sold Dodge automobiles.

The testimony established that in its automobile

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[3] A similar brochure was also mailed at the same time by the Dodge Division of Chrysler to owners of Ford, Chevrolet, and American Motors automobiles located in the same area.

manufacturing operations, Chrysler is divided into a number of divisions, including the Dodge Division; and that the primary function of each Division is to promote the sale of the car produced by it, in competition both with cars put out by other divisions of Chrysler, as well as with automobiles made by other companies. Thus, it is a recognized and accepted practice in the Chrysler complex for the different divisions, such as Dodge and Plymouth, as well as the individual dealers in such divisions, to compete with one another in the market place. In this instance, the management of Chrysler, in the exercise of its business judgment, determined that former DeSoto customers might be served by Dodge as well as by Plymouth dealers.

Plaintiff does not allege that the brochure was distributed maliciously, nor is any allegation made or proof submitted that the brochure was false in any respect as applied to plaintiff. The brochure contained no suggestion of fraud or misrepresentation, or of intimidation, obstruction, or molestation. *Louis Kamm, Inc.* v. *Flink,* 113 N.J.L. 582, 591 (E.&A. 1934). Use of the term "best qualified" to describe the Dodge dealer's ability to service DeSotos was at most mere "puffing".

In the opinion of the Court, the brochure in question was a lawful method of competition. DeSoto automobiles were no longer being made. The primary purpose of the brochure was to promote the sale of Dodge cars to former purchasers of DeSotos. Plaintiff had no monopoly on the new car business of DeSoto owners. Such owners were obviously good prospects for solicitation by a Dodge, Ford, Chevrolet, or

any other dealer, including plaintiff with his Plymouth line. The brochure of which plaintiff complains was prepared and distributed in furtherance of established Chrysler policy to assist its dealers in competing for business with all other dealers, whether such dealers sold Chrysler products or cars made by others.

Under these circumstances, the Court finds that in mailing the brochure in question, Chrysler did not commit an act so unjustifiable or unreasonable as to constitute a tortious interference with plaintiff's business and prospective economic advantage. See *Van Horn* v. *Van Horn,* 56 N.J.L. 318, 323 (E.&A. 1893); *Brennan* v. *United Hatters,* 73 N.J.L. 729, 744 (E.&A. 1906); *Louis Kamm, Inc.* v. *Flink, supra,* at pp. 586-591.

This opinion shall constitute findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure.

Judgment will be entered in favor of both defendants, dismissing the complaint in its entirety. Counsel for defendants, on notice to counsel for plaintiff, will please submit an appropriate order.

Appendix B—Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15523

BUONO SALES, INC., a Corporation of the State of New Jersey,

Appellant

v.

CHRYSLER MOTORS CORPORATION, a Corporation of the State of Delaware

and

CHRYSLER CORPORATION, a Corporation of the State of Delaware

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued February 7, 1966

Reargued June 10, 1966

Before STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

OPINION OF THE COURT

(Filed July 14, 1966)

By McLAUGHLIN, *Circuit Judge.*

This is one of nine suits by New Jersey DeSoto passenger automobile direct dealers for Chrysler Motors Corporation, a corporation of the State of Delaware with its principal place of business in Michigan, against said Chrysler Motors Corporation and Chrysler Corporation, also a corporation of the State of Delaware with its principal place of business in Michigan. The said nine plaintiffs are all New Jersey corporations with their principal offices in said state. It was agreed in the case that the separate entities of the defendant corporations be disregarded and that the acts of both be deemed the acts of Chrysler Corporation. This resulted in the dropping of the second, third and fifth causes of action. The parties also stipulated in the district court and on this appeal that, because all nine cases are similar in law and fact, the determination in the present appeal will apply to the other eight appeals. The district judge, sitting without a jury, decided in favor of the defendants and plaintiff appeals.

Plaintiff has been selling Chrysler products since approximately 1935. Since 1953 it has had a direct dealer agreement with Chrysler with respect to DeSoto and Plymouth passenger automobiles. On or about November 18, 1960 Chrysler discontinued its production of DeSoto passenger automobiles. In its notification to plaintiff of that course it made no pretension that it was acting in accordance with the agreement. A reading of the contract readily reveals the reason

for this. It is completely a self-serving Chrysler product. It was drawn by Chrysler and on several occasions revised by that concern. It is what was the admittedly uniform Chrysler DeSoto-Plymouth agency contract used by Chrysler with its over sixteen hundred such dealers. It takes elaborate precaution to protect Chrysler in the event of any contemplated exigency. It is very clear from the contract itself that the thought that sometime in the future Chrysler might abandon the manufacture of DeSoto passenger automobiles was plainly not within Chrysler's thinking when it entered into its dealer agreements with Buono and the others. Had it been intended that the contract include Chrysler's right to close out its DeSoto business if and when it chose to do so, nothing could have been easier than to say so. It is beyond belief that Chrysler endeavored to provide for that contingency by subterfuge. Chrysler was unquestionably the dominating party to the agreement with the dealers taking whatever arrangement Chrysler chose to give them. Deceiving its dealers from the beginning as to what would have been an all important element of the agreement, hardly fits that situation or indeed into the basic picture of an outstanding American industry. As appears from the record this matter arises wholly from a radical corporate determination, for whatever the reason, to cut its production losses on DeSoto immediately. The inevitable collateral consequences of that move, the damage claims of its dealers, etc., if then bothered about at all, undoubtedly were regarded as the lesser evil which could be handled later.

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The defense has done all that could be accomplished in meticulously dredging out of the contract every stray bit of language that can possibly lend some support to the hastily assumed, unwarranted position of the defendant. Taken as a whole, which is the way the contract admittedly must be construed, or even isolating fragments of it as is attempted, there is not one word in the document to suggest that the manufacturer reserved the right to stop making DeSoto automobiles for any reason or no reason. The intention of the parties is set out succinctly in the first introductory paragraph which reads:

> "The purpose of the relationship established by this agreement is to provide a means for the sale and service of DeSoto and Plymouth passenger cars and DeSoto and Plymouth car parts and accessories in a manner that will best serve the interests of the retail customer and be of benefit to DIRECT DEALER and DESOTO-PLYMOUTH."

The same purpose is stated in Paragraph 5 which makes the agreement "* * * *the entire agreement between the parties relating to the purchase by* DIRECT DEALER *of new De Soto and Plymouth passenger cars and De Soto and Plymouth passenger car parts and accessories from* DE SOTO-PLYMOUTH *for resale, and it cancels and supersedes all earlier agreements, written or oral, between* DE SOTO-PLYMOUTH *or Chrysler Corporation and* DIRECT DEALER *relating to the purchase by* DIRECT DEALER *of De Soto and Plymouth passenger cars and De Soto and Plymouth passenger car parts and accessories.*" (Emphasis supplied).

The last subparagraph of Paragraph 5 categorically notes that *"this agreement does not have an expiration date."* (Emphasis supplied). Chrysler is therefore given the right to amend the agreement as it "deems advisable", "provided that DeSoto-Plymouth makes the same amendment in DeSoto-Plymouth Direct Dealer Agreements generally. The amendment will be set out in a notice signed by the President or Vice-President of Chrysler Motors Corporation. Thirty-five (35) days after delivery of the Notice to the Direct Dealer this agreement will be deemed to be amended in the manner and to the extent set forth in the notice." No attempt was ever made to amend the notice by following the procedure called for by Paragraph 5 or otherwise.

Paragraph 5 also makes it an agreement term that "DeSoto-Plymouth may terminate it individually *only as provided for in Paragraph 21.*" (Emphasis supplied). The latter, regarding this, reads:

> "DE SOTO-PLYMOUTH may terminate this agreement on not less than ninety (90) days' written notice on (1) the failure of DIRECT DEALER to perform fully any of DIRECT DEALER's undertakings and obligations in Paragraphs 7 through 10 and Paragraph 14 of this agreement, or (2) the death of any person listed in Paragraph 2 of this agreement, other than the death of DIRECT DEALER if he is an individual, or the failure of any such person so listed to continue his active and substantial participation in the management of DIRECT DEALER's organization, or (3) a misrepresentation of or change in any of the ownership

interests listed in Paragraph 3 of this agreement resulting in a transfer of majority control or interest in the capital stock or partnership interest of DIRECT DEALER, unless DE SOTO-PLYMOUTH has given written approval to such change, or (4) a disagreement, dispute or controversy between or among principals, partners, managers, officers or stockholders of DIRECT DEALER that, in the opinion of DE SOTO-PLYMOUTH, may affect adversely the operation, management or business of DIRECT DEALER, or (5) the conviction of DIRECT DEALER, or a partner, principal stockholder, officer or manager of DIRECT DEALER of any crime that, in DE SOTO-PLYMOUTH's opinion, may affect adversely the operation or business of DIRECT DEALER or the name, good will, or reputation of DE SOTO-PLYMOUTH, De Soto or Plymouth products or DIRECT DEALER."

None of the listed situations, because of which DeSoto-Plymouth could terminate its contract with the nine plaintiff dealers, ever occurred and there is no claim to the contrary. Despite make-weight quibbling on behalf of the appellee again there is an utter absence of any mysterious or ambiguous wordage respecting Chrysler's right to end the agreement. Actions or conduct, slight or grievous, on the part of the dealer to which Chrysler took exception gave the latter the right to terminate. Confessedly none of the dealers was or could be so charged.

Continuing the futile search to find a valid pretext for Chrysler we are told that Paragraph 10 takes care of this. The part of a sentence relied on is "* * *

nor will anything in this agreement obligate DE SOTO-PLYMOUTH to deliver to DIRECT DEALER any particular number of new De Soto or Plymouth passenger cars." This it is contended "insulates appellee from liability for discontinuance of DeSoto production whether appellee's action is characterized either as contract modification or contract termination, depending upon the dealer affected." And in the same paragraph it is further urged that the phrase "De Soto-Plymouth will not be liable for delay or non delivery of products ordered * * *" exonerated the manufacturer from liability to the dealers "even in the absence of the rights of discontinuance and amendment" and "* * * regardless of the existence of good faith or other contractual rights." The proposition is put forth as supported by *F. H. McClintock Co.* v. *Truxell Sales & Service,* 297 Mich. 284 (1941). That decision, for whatever it may be worth, has no application to the admitted facts before us.

The dispositive answer to the above assertion that Paragraph 10 gives DeSoto-Plymouth the right to permanently stop DeSoto production is found right in Paragraph 10 and in the identical sentence from which the above quotations were taken out of context. Paragraph 10 is captioned "Orders". It provides the method by which the dealer orders the cars and for the strong control granted Chrysler over its deliveries. The paragraph reads:

> "DE SOTO-PLYMOUTH agrees to ship De Soto and Plymouth passenger cars and De Soto and Plymouth passenger car parts and accessories to DIRECT DEALER only on DIRECT DEALER's order.

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"DIRECT DEALER agrees to submit to DE SOTO-PLYMOUTH current orders for De Soto and Plymouth passenger cars and De Soto and Plymouth passenger car parts and accessories, and estimates of DIRECT DEALER's future passenger car requirements at such times and for such periods as DE SOTO-PLYMOUTH reasonably may request for the mutual benefit of dealers and DE SOTO-PLYMOUTH. DIRECT DEALER will submit such orders and estimates on forms DE SOTO-PLYMOUTH provides. All orders are subject to acceptance by DE SOTO-PLYMOUTH, which may be in whole or in part. DE SOTO-PLYMOUTH will use its best efforts to fill accepted orders for De Soto and Plymouth passenger cars and De Soto and Plymouth passenger car parts and accessories; however, DE SOTO-PLYMOUTH will not be liable for delay or nondelivery of products ordered nor will anything in this agreement obligate DE SOTO-PLYMOUTH to deliver to DIRECT DEALER any particular number of new De Soto or Plymouth passenger cars."

It is an understatement to say that Paragraph 10 simply outlines the running order and delivery part of the DeSoto-Plymouth dealer relationship. It is pretty much under the domination of the manufacturer with respect to the number of cars it allots a dealer but Paragraph 10 cannot be tricked up into presenting any right to Chrysler to end its making of DeSoto passenger cars. It contains the rules for a functioning business and though strongly hedged around nevertheless DeSoto-Plymouth pledges as part

of the continuing association with its dealer that it "* * * *will use its best efforts to fill accepted orders for DeSoto and Plymouth passenger cars and DeSoto and Plymouth accessories;* * * *.*" (Emphasis supplied). Appellee is expressly and properly reluctant to resort to this argument which possesses no merit whatsoever.

Paragraph 28 of the agreement is mentioned as another ground for Chrysler ending the DeSoto passenger car. That is titled "Inability to Perform". It reads:

> "In addition to any other exemption from liability specifically provided for in this agreement, neither DIRECT DEALER nor DESOTO-PLYMOUTH will be liable for failure to perform its part of this agreement when the failure is due to fire, flood, strikes or other labor disputes, accident, war, riot, insurrection, acts of government, governmental regulation or other circumstances beyond the control of the parties."

This time the clause "* * * other circumstances beyond the control of the parties" is removed from the paragraph and is construed to mean that if Chrysler for business circumstances as it claims or any other circumstances thoroughly foreign to the title, text and purport of 28 decides to finish with its manufacture of DeSotos it may do so. The catch-all language relied upon is limited to the kind of events specifically named. It will not serve as a convenient umbrella to cover the entirely unrelated good or bad business conditions and practice alleged. This con-

tract by its terms is to be under Michigan law. The latter follows the general rule mentioned. *Hamilton* v. *Stephans,* 240 Mich. 228 (1927); *Quisle* v. *Brezner,* 212 Mich. 254 (1920); *Park Building Co.* v. *Yost Co.,* 208 Mich. 349 (1919).

Finally there is Paragraph 20 upon which the district court principally depended in deciding in favor of the defendant. The title of 20 and its text reads:

"20.

CHANGE OF MODELS, PARTS AND ACCESSORIES DECLARED OBSOLETE OR DISCONTINUED

"DESOTO-PLYMOUTH at any time may discontinue any models, lines or body styles and may revise, change or modify their construction or classification. All orders will refer to models, lines and body styles in production at the time DESOTO-PLYMOUTH receives the orders unless DIRECT DEALER specifies otherwise. DESOTO-PLYMOUTH at any time may declare obsolete or discontinue any or all parts, accessories and other merchandise. DESOTO-PLYMOUTH may act under this Paragraph 20 without notice and, except as set forth in Paragraph 13 of this agreement, without any obligation to DIRECT DEALER by reason of DIRECT DEALER's previous purchases."

The defense view is that the words in the text "models", "lines", "body styles" individually or to-

gether mean the DeSoto passenger automobile. This is especially emphasized with respect to the word "lines". The title of 20, its opening sentence and every word of the balance of the paragraph are the strongest possible refutation of this far fetched assumption. In the district court it was finally accepted that "model" meant year of make and that "body style" referred to a particular kind of automobile as a two-door or a four-door, hardtop or convertible. The defense seemingly on the theory that the word "line" needed testimony to clarify it called the president of Chrysler Corporation as a witness. He gave evidence as follows:

> "Q. The fifteen page of this progress report of November 26 [1958], marked P-7 for identification, Mr. Quinn would you read the paragraph under "DeSoto," one paragraph? A. The DeSoto product plan is progressing within the framework outlined in the previous report. The names of the two model lines have been decided, Fireflite for the low line, Adventurer for the high line. The product planning letter has been issued, which details all the major specifications for the revised DeSoto line.
>
> Q. And the Fireflite DeSoto was considered the low line of the DeSoto passenger car, isn't that so? A. Yes, sir.
>
> Q. And the Adventurer was considered the high line? A. Yes, sir.
>
> Q. But they were both considered lines within the DeSoto passenger car framework? A. That's what the bulletin says."

There was really no need of the above testimony. The contract is plenary proof that "line" or "lines" in that paper, as the Chrysler witness had to verify, merely designated a type or types of DeSoto passenger car or automobile. The latter designation is repeated thirty times in the agreement. It is the generic term for the Chrysler DeSoto automobile. The word "line" or "lines" does not appear in the agreement at all as meaning the DeSoto passenger automobile complex. It was precisely used to designate types of DeSoto cars and, in the same double agreement, types of Plymouth automobiles. The thought is advanced that the use of plurals in "models, lines or body styles" is significant and shows that the words "all 'lines' could be discontinued", in effect allows discontinuance of all production of the DeSoto. It is beyond belief to countenance the final close out of the manufacture of the DeSoto automobile on that foundation. It must be recorded in passing that the above Paragraph 20 does not allow the discontinuance by DeSoto Plymouth of *all* models, lines and body styles. The paragraph actually says "DeSoto Plymouth at any time may discontinue *any* models, lines and body styles * * *." (Emphasis supplied). The paragraph goes on about its business of further stating other governing details of the manufacturer-dealer operation. There is not the slightest inference that it has to do with other than that and certainly nothing to convey the impression that under it Chrysler is granted the right of effective termination. *It is perhaps fitting that the very next paragraph of the contract, number 21, which*

has already been discussed, is captioned "Termination".

It is noteworthy that the representation that in the critical period DeSoto sales suffered an extremely serious decline due to the shift in consumer tastes from the middle priced car field to the lower priced and foreign car fields, according to the defense itself in the answer, is only "one of the reasons given for the discontinuance of the DeSoto passenger automobile * * *." Another reason stressed for discontinuance was that since 1957 there had been "persistent reports of its discontinuance. These widely circulated reports had an adverse effect upon our mutual ability to merchandise this fine product in a successful manner." No mention is made as to whether those reports had validity. And there is no allusion at all to whether there were any intrinsic management problems or whether there were vital management changes thereafter.

The contract under Paragraph 21 could be terminated by a direct dealer on "not less than thirty (30) days' written notice." It was Chrysler management who intentionally drew the agreement without an expiration date and gave to itself certain named rights for termination as set out above in Paragraph 21. It was expressly because of this that Chrysler in Paragraph 5 reserved to itself the right to amend the agreement as it "deems advisable" by taking certain procedural steps. That portion of Paragraph 5 is worth repeating. It reads:

> "Since this agreement does not have an expiration date and DESOTO-PLYMOUTH may terminate

it individually only as provided in Paragraph 21, and since circumstances may exist that DESOTO-PLYMOUTH believes require amending all DeSoto-Plymouth Direct Dealer Agreements, DESOTO-PLYMOUTH will have the right to amend this agreement to the extent that DESOTO-PLYMOUTH deems advisable, provided that DESOTO-PLYMOUTH makes the same amendment in DeSoto-Plymouth Direct Dealer Agreements generally. The amendment will be set out in a notice signed by the President or a Vice-President of Chrysler Motors Corporation. Thirty-five (35) days after delivery of the notice to DIRECT DEALER, this agreement will be deemed to be amended in the manner and to the extent set forth in the notice."

The above eliminates any guessing as to what sort of contract is before us. The dealer could terminate it on not less than thirty days' notice. Chrysler could terminate it only for certain stated reasons concerning the dealer. Chrysler could also amend the agreement as it "deems advisable" by simply following notice provisions of Paragraph 5. None of those eventualities occurred. We do not pass finally upon whether Chrysler under the "deems advisable" grant could so amend the contract as to include its discontinuance of the manufacture of DeSoto passenger cars which would in effect terminate the agreement under the guise of amending it. There was no endeavor by Chrysler to bring its action within that clause either at the time of its discontinuance of DeSotos or since. However, there is some late argument to this court urging that the taking by the dealers

of Chrysler's allowance to DeSoto dealers of a $300 credit on unsold cars is a waiver by the dealers of the contract involved here. That contention did not appear in the original answer or until the last pretrial conference. It certainly was not pressed to the district judge who correctly held that:

> "It is plaintiff's contention in count one of its complaint that Chrysler's discontinuance of the DeSoto automobile constituted a breach of this Agreement. Chrysler, on the other hand, in addition to other reasons advanced to justify its action, takes the position that the Agreement, by its very terms, gave it the right to discontinue the DeSoto, without notice, and without any obligation to plaintiff. The problem thus boils down to one of interpretation and construction of the Agreement in question."

The credit allowance which readily fits in, as appellant mentions, with the manufacturer's ordinary allowance to its dealers on unsold cars, was never the subject of any agreement, formal or otherwise, whereby the dealer accepts the rebates and waives its contract. There is no mention of that intention in Chrysler's telegram or letter of discontinuance. This is merely another example of the intensive defense exploration for something to bolster its position. It is entirely without merit.

The contract before us is clear. Its unmistakable intent is to protect Chrysler as to its dealers in every foreseen contingency. It does not by its terms or impliedly give Chrysler the naked right to discontinue

without contract cause, manufacturing and distributing to its dealers DeSoto automobiles. In so doing Chrysler broke the contract.

Tortious Interference

Appellant, representative of the dealer plaintiff, claims, also sues for tortious interference in its business by defendant.

The facts are not disputed. Following its discontinuance of the manufacture of the DeSoto automobile, defendant sent to all plaintiff's DeSoto owner customers literature telling of its discontinuance of the DeSoto and that, inter alia, "He [your dependable Dodge dealer] is best qualified to give your DeSoto the genuine factory improved service it deserves." This was excused by the district court as "a lawful method of competition"; "at most mere puffing". The court held that "Chrysler did not commit an act so unjustifiable or unreasonable as to constitute a tortious interference with plaintiff's business and economical advantage." The court and the parties rightly agree that New Jersey law governs the issue in this instance. Under that law the defendant's carefully planned method of enticing plaintiff's DeSoto customers away from plaintiff and to defendant's active Dodge and Chrysler dealers was tortious interference with plaintiff's business. *Louis Kamm, Inc.* v. *Flink,* 113 N.J.L. 582 (Ct. E & A 1934); *Sustick* v. *Slatina,* 48 N.J. Super. 134 (App. Div. 1957); *Brenner* v. *Perl,* 72 N.J. Super. 160 (App. Div. 1962); *Raymond* v. *Cregar,* 72 N.J. Super. 73 (App. Div. 1962) mod.

38 N.J. 472 (1962); *Louis Schlesinger Co.* v. *Rice*, 4 N.J.L. 169, 181 (1950).

The judgment of the district court will be reversed on both counts and the case remanded to that court for entry of judgment in favor of the plaintiff on both counts and for trial as to damages on both counts.

FORMAN, *Circuit Judge*, dissenting.

This appeal encompasses two distinct problems. The first issue raised is whether Chrysler's Direct Dealer Agreement permitted the termination of DeSoto automobile production and, if so, whether such production was terminated in accordance with the provisions of that Agreement. In determining that the Direct Dealer Agreement did not authorize Chrysler's termination of DeSoto production in the manner in which it acted, the majority places much emphasis on the absence of an explicit termination provision as indicating that Chrysler, the drafter of the Agreement, and Buono Sales, did not intend a discontinuance of DeSoto production. The majority further concludes that the notice of termination embodied in the telegram and form letter of November 18, 1960 sent to all DeSoto direct dealers was insufficient to constitute such a modification under Paragraph 5.

The second issue raised is whether the representation of the Dodge Division of Chrysler in a brochure circulated to DeSoto owners that it was "best qualified to give [the discontinued DeSoto automobile] the genuine factory-approved service it deserves" was a

tortious interference with the business relationships and prospective economic advantage of Buono Sales. The majority finds that such representation constituted a commercial tort.

We are constrained to dissent from these conclusions and the reversal of the judgment of the District Court.

—I—

Certain preliminary observations are in order. It is self-evident that the presence of a provision in the Direct Dealer Agreement authorizing, in so many words, the termination of all DeSoto production would have greatly simplified the problem of contract interpretation here. The absence of such a provision, however, is given undue emphasis. In our view a significant amount of fairly plain language in the Agreement has thereby been given a strained construction to support the position taken by Buono Sales.

The observation, that the Direct Dealer Agreement "is completely a self-serving Chrysler product" which "takes elaborate precaution to protect Chrysler in the event of any contemplated exigency" and that, therefore, the absence of an explicit termination provision is persuasive of no intent to eliminate DeSoto production, in the future, does not present a balanced view of the Agreement in the light of the mutuality of obligation inherent in the explicit authority given the direct dealers themselves to withdraw totally from the Agreement on 30 days written notice apparently

for whatever reason.[1] Furthermore, under Paragraph 7, the direct dealers' minimum purchase requirements from Chrysler were directly geared to market conditions in the dealers' localities.[2] The intimation drawn from the characterization of the Agreement, as a self-serving document, that it must necessarily be construed against its drafter, is unwarranted. Invocation of such a rule of construction is furthermore not appropriate here, for it would not be reasonable considering both the existence of much plain language in

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[1] Paragraph 21 of the Direct Dealer Agreement in part states:

"DIRECT DEALER may terminate this agreement on not less than thirty (30) days' written notice."

[2]

* * * *

"DIRECT DEALER'S Minimum Sales Responsibility will be determined separately for DeSoto and Plymouth passenger cars as follows:

"From time to time, but at least once a year, DE SOTO-PLYMOUTH will compute the ratio of the number of new De Soto or Plymouth passenger cars, as the case may be, registered in the most recent 12-month period for which registration figures are available in the DE SOTO-PLYMOUTH Sales Region in which DIRECT DEALER is located to the number of all new passenger cars so registered in that Region. The ratio thus obtained will be applied to the number of all new passenger cars registered during the same 12-month period in DIRECT DEALER'S Sales Locality. The resulting number (and the percentage share of market that such number represents for the Sales Locality) will be DIRECT DEALER'S Minimum Sales Responsibility for this same twelve (12) month period, subject to such adjustment as is described below.

"Where appropriate, DE SOTO-PLYMOUTH will adjust DIRECT DEALER'S Minimum Sales Responsibility to take into account the availability of passenger cars, local conditions, revisions in DIRECT DEALER'S Sales Locality description, the recent trend in DIRECT DEALER'S sales performance, and the other factors, if any, directly affecting sales opportunity."

* * * *

support of Chrysler's petition and the background history of the industry.

We recognize that this court's primary duty is to determine the meaning of the language of the contract but, in so doing, the commercial context in which both litigants conduct their respective business operations must be squared with the construction placed on the language of the Agreement. The record reflects the volatile nature of the automobile industry due to changes in consumer tastes and effects of competition. Buono Sales, itself, which had been franchised to deal in DeSoto automobiles since 1935, and had been and is now so franchised to deal in Plymouth automobiles had, prior to that time, experienced the discontinuance of the production of a number of automobiles in which it dealt. In the period 1955-60 DeSoto sales suffered an extremely serious decline[3] due to the shift in consumer tastes from the middle-priced automobile field, which included DeSoto, to the lower-priced and foreign car field. Significantly, in 1959, just prior to the discontinuance of DeSoto production, Buono Sales and other direct dealers became franchised by Chrysler to sell and maintain the compact automobile Valiant, then newly produced. Of course, in the absence of a contract which has

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3 " . . . New car registrations of DeSotos in the United States dropped from 118,062 in 1955 to 23,063 in 1960. Plaintiff's own car sales of the DeSoto automobile, which in 1955 and 1956 had accounted for over 50% of its total new car sales, accounted for only 12 out of a total of 89 new cars sold by it in 1960 . . . " *Buono Sales, Inc.* v. *Chrysler Motors Corporation*, 239 F. Supp. 839, 840 (D.N.J. 1965).

language reasonably susceptible to construction consistent with the commercial history of the parties, such commercial background cannot be employed as persuasive on the issue of contract interpretation. But here, given the presence of what will be shown to be substantial expressions in the Direct Dealer Agreement authorizing the termination of DeSoto production without notice we cannot accept the majority's view of the meaning of the Agreement for it is alien to the business experience of both litigants as disclosed by the record.

—II—

The central consideration is the determination of the meaning of certain language in the Direct Dealer Agreement. The District Court found Paragraph 20 to be determinative of the case. Paragraph 20 provides:

> "DE SOTO-PLYMOUTH at any time may discontinue any models, lines or body styles and may revise, change or modify their construction or classification. . . . DE SOTO-PLYMOUTH at any time may declare obsolete or discontinue any or all parts, accessories, and other merchandise. DE SOTO-PLYMOUTH may act under this Paragraph 20 without notice and, except as set forth in Paragraph 13 of this agreement, without any obligation to DIRECT DEALER by reason of DIRECT DEALER's previous purchases."

Buono Sale's argument before the District Court and before us is that Paragraph 20, in effect, authorized discontinuance of any DeSoto automobiles short of discontinuance of all DeSoto automobiles. This position is founded on Buono Sale's definition of the term "lines" which it contends refers to a series of DeSoto automobiles, *i.e.*, the Adventurer series or the Fireflite series. This being so, argues Buono, only a series, *e.g.*, Adventurer, if more than one series is produced, could be discontinued, but the total production of DeSoto automobiles could not be discontinued. The District Court went to the record where there was evidence to prove that the contracting parties understood "line" to be synonymous with DeSoto, as well as with a series of DeSoto, such as Adventurer. The majority rejects the use of this extrinsic evidence on the grounds that the context of the contract without more demonstrates that "line" was not meant to be synonymous with the DeSoto automobile. Assuming the impropriety of weighing the extrinsic evidence as to the meaning of "line", and that the majority properly reads the contract language as to the meaning of "line", this term was used in the plural in Paragraph 20. Thus, even if "line" meant something less than all DeSoto automobiles, "any . . . lines", as stated in Paragraph 20, could be discontinued. There is no indication in the Agreement that the term "any" limited Chrysler from terminating production of all DeSoto "lines." The plain language should govern.

The majority reads "any" to mean something less than all, however. Such a construction does not

comport with the dictionary definition of "any".[4] "Any" is clearly defined as specifying a choice of a limited or unlimited number of alternatives presented by the noun which it modifies. Thus, the provision for the discontinuance of "any . . . lines . . . without notice" is the authority for the discontinuance of one, some, or all lines without notice.

With further reference to Paragraph 20, there appears to be agreement that the term "model" refers to automobiles sold under the name DeSoto or Plymouth for a particular year, *e.g.*, a 1961 DeSoto. The word "models" as with "lines" is employed in Paragraph 20 in the plural. The action of Chrysler consisted in the discontinuance of the 1961 model and future yearly models of the DeSoto and thus would have been expressly authorized by the right to discontinue "any models . . . without notice" even if the word "lines" was not included at all. This further evidences that Paragraph 20 authorized Chrysler's discontinuance of the production of the DeSoto automobile.

Given Buono Sale's concession that Paragraph 20 authorizes the discontinuance of any lines or any models, it appears imperative to read the plain language as authorizing the total discontinuance of the DeSoto production. A rapid curtailment of production just short of total discontinuance could as significantly affect a dealer's DeSoto business as total discontinuance. Furthermore, Paragraph 20 author-

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[4] See the all encompassing definition in Webster, New International Dictionary (2 ed. 1961).

izes Chrysler to "discontinue any or all parts."[5] Without parts the direct dealers' sales of the DeSoto automobiles would create an impossible business situation. In sum then, the contracting parties would not have intended to authorize such an anomaly, permitting partial but not total discontinuance of DeSoto production, although the effect of either would more than likely be similar.

Buono Sales and the other eight dealers whose suits now depend on the disposition of this appeal all had arrangements to deal in both the DeSoto and Plymouth automobiles. They now have agreements to deal in both the Plymouth and Valiant automobiles. Paragraph 20 cannot be meaningfully construed without considering the continued existence of other Chrysler automobiles in the hands of the direct dealers. Paragraph 20 is entitled: "Change of Models, Parts and Accessories Declared Obsolete or Discontinued." That language indicates that Paragraph 20 grants to Chrysler the right to make adjustments in the continuing business relationship it has with its direct dealers. Paragraph 20 does not appear to authorize Chrysler's justifying a permanent elimination of all automobile supply from all of Chrysler's divisions to the direct dealers, in the absence of a formal Paragraph 5 Agreement modification. The plain language

[5] At this point in the Paragraph the term "all" is introduced, and used conjunctively with "any." Based upon the unambiguous dictionary definition of "any" as encompassing "all," we are of the view that the mention of "all" at this point is merely redundant and surplusage to the term "any." This use of "all" cannot reasonably reflect an intention that the previous usage of "any" alone is indicative that "any" was meant to denote something less than "all."

of Paragraph 20, however, in our view, authorizes the discontinuance of those automobiles which will at least assist Chrysler in its adjustment to changed market conditions, without terminating the sale to the direct dealers of all automobiles from its divisions with which the direct dealers are under contract. Introduction of Valiant and termination of the DeSoto "models" and "lines" was such an adjustment. This construction is reasonable and squares with the commercial history of the automobile industry. The explicit language of Paragraph 20 would seem to authorize the discontinuance of DeSoto automobiles. The intent of the parties was to allow Chrysler to gauge its production by the contingencies of the market.

Other paragraphs of the Direct Dealer Agreement support such a reading of Paragraph 20. Paragraphs 7, 10, 13 and 28 of the Agreement recognize circumstances in which Chrysler may not be able to perform in full its obligations and is, therefore, relieved of liability therefrom. Paragraph 7 provides:

* * * *

> "To the extent that DE SOTO-PLYMOUTH for any reason other than DIRECT DEALER's failure to submit orders or arrange payment, delivers to DIRECT DEALER less than the number of new De Soto or Plymouth passenger cars that represents DIRECT DEALER's Minimum Sales Responsibility as defined above, DIRECT DEALER's Minimum Sales Responsibility will be proportionately reduced."

Paragraph 10 tells us that:

> ". . . DE SOTO-PLYMOUTH will not be liable for delay or nondelivery of products ordered nor will anything in this agreement obligate DE SOTO-PLYMOUTH to deliver to DIRECT DEALER any particular number of new De Soto or Plymouth passenger cars."

Paragraph 13 lays out a program by which Chrysler must either help a dealer in difficulty, through sales promotion techniques or, failing to so act, must provide a dealer with an allowance per each left-over automobile on the day of the announcement to the public of the new yearly model. But, paragraph 13 provides that appellee does not have to so proceed if:

> ". . . fire, flood, strikes or other labor disputes, accident, war, riot, insurrection, acts of government, governmental regulation or other circumstances have not substantially affected the availability of DeSoto or Plymouth passenger cars at the time of announcement to the public of new yearly models. . . ."

Finally, Paragraph 28 provides:

> "In addition to any other exemption from liability specifically provided for in this agreement, neither DIRECT DEALER nor DESOTO-PLYMOUTH will be liable for failure to perform its part of this agreement when the failure is due to fire, flood, strikes or other labor disputes, accident, war, riot, insurrection, acts of government, gov-

ernment regulation or other circumstances beyond the control of the parties."

A reading together of Paragraphs 7, 10, 13 and 28 demonstrates that the contracting parties were aware that circumstances could arise which would excuse Chrysler both from the production of at least some automobiles and certain collateral performance. It has been suggested that the phrase "other circumstances beyond the control of the parties" appearing in Paragraphs 13 and 28 is limited by the rule restricting the phrase to events of the same nature or class as the specifics preceding it. Such an argument provides little leverage for Buono Sales. Economic depression of the entire market or a part thereof certainly is as serious to the automobile industry as the effect of the specific acts articulated in Paragraphs 13 and 28. The history of the industry as set forth in the record reflects this seriousness. Thus, we feel that market conditions were problems to which Paragraphs 13 and 28, as well as Paragraphs 7 and 10, were addressed.

Chrysler suggests that Paragraph 10, without more, provides ample basis for discontinuing the DeSoto automobile, without liability for breach of contract flowing therefrom. Though we have applied that Paragraph solely as support for our reading of Paragraph 20, an application of the law of Michigan by which this contract specifies it is to be construed, as embodied in a decision of the Supreme Court of Michigan, *McClintock Co.* v. *Sales & Service, Inc.*,[6] would appear to support Paragraph 10, even standing

[6] 297 Mich. 284 (1941).

alone, as being dispositive of the problem adversely to Buono Sales.

In *McClintock,* plaintiff was a dealer, such as Buono, and defendant was a distributor of Chrysler. Agreements between plaintiff and defendant had been executed for the supply and sale of DeSoto and Plymouth automobiles. They provided, among other things, for defendant to give not less than 90 nor more than 95 days' written notice for termination. The following provision also appeared:

> "Direct dealer shall have the right to accept, in whole or in part, any or all orders received, and shall not be liable for any loss or damage resulting from its failure to ship or deliver goods ordered."

Subsequently, defendant sent an "immediate effective" notice of termination to plaintiff and no longer supplied either DeSotos or Plymouths. Plaintiff brought suit claiming damages for loss of sales during the 90 day period until the notice became effective.

The Michigan Supreme Court ruled that the explicit language of the agreement stating that defendant could not be held "liable for any loss or damages resulting from its failure to ship and deliver goods ordered," language identical in import to that in paragraph 10, insulated defendant from liability, as Chrysler here urges. Specifically the Court said:

> "We are obliged to consider the agreement in its entirety, including the effect of the above-quoted clause as well as others. We cannot make a new agreement for the parties. Defendant never ac-

cepted the orders on which plaintiff's claim for damages is based. By the explicit language of the agreement, it cannot be held 'liable for any loss or damages resulting from its failure to ship and deliver goods ordered.' . . ." At p. 287.

As a pronouncement of the highest court of Michigan the decision should be given its due weight in support of Chrysler's position herein.

Paragraph 21[7] entitled "Termination" adds to the light shed on Paragraph 20 by Paragraphs 7, 10, 13 and 28. In it the instances in which Chrysler, automatically or on ninety days' notice, may terminate any Direct Dealer Agreement, relate to either the conduct of a *dealer* or circumstances economic or otherwise to

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[7] Paragraph 21 states in part:

"'DIRECT DEALER may terminate this agreement on not less than thirty (30) days' written notice.

"DE SOTO-PLYMOUTH may terminate this agreement on not less than ninety (90) days' written notice on (1) the failure of DIRECT DEALER to perform fully any of DIRECT DEALER's undertakings and obligations of Paragraphs 7 through 10 and Paragraph 14 of this agreement, or (2) the death of any person listed in Paragraph 2 of this agreement, other than the death of DIRECT DEALER if he is an individual, or the failure of any such person so listed to continue his active and substantial participation in the management of DIRECT DEALER's organization, or (3) a misrepresentation of or change in any of the ownership interests listed in Paragraph 3 of this agreement resulting in a transfer of majority control or interest in the capital stock or partnership interest of DIRECT DEALER, unless DE SOTO-PLYMOUTH has given written approval to such change, or (4) a disagreement, dispute or controversy between or among principals, partners, managers, officers or stockholders of DIRECT DEALER that, in the opinion of DE SOTO-PLYMOUTH may affect adversely the operation, management or business of DIRECT DEALER, or (5) the conviction of DIRECT DEALER, or a partner, principal stockholder, officer or manager of DIRECT DEALER of any crime that, in DE SOTO-PLYMOUTH's opinion, may affect adversely

which a *dealer* may be subject. As noted above, many other paragraphs of the Agreement excuse Chrysler from the obligation of contract performance based on conditions directly affecting Chrysler, conditions which are unrelated to the conduct of a dealer or circumstances in which a dealer is placed. But, as to Paragraph 21, the termination provision covers ground not previously dealt with in other paragraphs, namely, that conduct of a *dealer* or a situation in which a *dealer* may be placed which will excuse the manufacturer from performance. A gap is thereby left, which can appropriately be closed by a reasonable interpretation of Paragraph 20 and the other provisions of the contract as have been discussed above.

—III—

Even if Paragraph 20 of the Direct Dealer Agreement and the other supporting paragraphs could not reasonably be construed to authorize the discontinuance of DeSoto automobile production, both the telegram and form letter of November 18, 1960 sent to all

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the operation or business of DIRECT DEALER or the name, good will, or reputation of DE SOTO-PLYMOUTH, De Soto or Plymouth products or DIRECT DEALER."

* * * *

"Notwithstanding the provisions above, this agreement will terminate automatically without notice from either party on: (1) the death of DIRECT DEALER if he is an individual, or (2) an attempted assignment of this agreement by DIRECT DEALER without the written consent of DE SOTO-PLYMOUTH, or (3) an assignment by DIRECT DEALER for the benefit of creditors, or (4) the admitted insolvency of DIRECT DEALER or of any partner of DIRECT DEALER if it is a partnership, or (5) the institution of voluntary or involuntary proceedings by or against DIRECT DEALER in bankruptcy or under insolvency laws or for corporate reorganization, arrangement, receivership or dissolution."

DeSoto direct dealers was sufficient to constitute a modification under Paragraph 5 of the Agreement, effective, however, after 35 days had elapsed. The absence of any reference to Paragraph 5 in the telegram and letter, and Chrysler's attempt to take advantage of Paragraph 5 to effect an immediate change, do not turn the issue adversely to Chrysler. All features of the modification procedure but the 35 day notice aspect were adhered to. Buono Sales and the other direct dealers were given adequate substantive notice. A mere change in the technical language of Chrysler's communications would not have improved the quality of the notice given them. The direct dealers could not have understood but that Chrysler was discontinuing production of the DeSoto automobile. But for the necessity of moving the effective date of the notice 35 days ahead from November 18, 1960 to December 22, 1960, it does not appear to us that there is any genuine difficulty with Chrysler's having adequately invoked Paragraph 5 of the Agreement. Thus, at the very most, Paragraph 20 aside for the moment, Buono Sales and the other direct dealers would be entitled to offer no more than their proof of damages covering the 35 day period prior to the date the modification notice became effective.

—IV—

Buono sales also sued for tortious interference with business relationships and a prospective economic advantage. Shortly after the discontinuance of DeSoto automobile production, the Dodge division of Chrysler circulated a nine panel brochure to certain DeSoto

owners, in one panel of which it was stated that Dodge dealers were "best qualified to give your DeSoto the genuine factory-approved service it deserves."[8] Buono Sales contends that such action was creative

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[8] Of the nine panels, eight advertised the alleged virtues and advantages of Dodge automobiles, at times as related to products of competitors other than DeSoto-Plymouth. A ninth panel contained the following:

"Dear DeSoto Owner:

"Your DeSoto was one of the best engineered, best built cars in its day. I hope it has given you good service. When you bought it, your DeSoto was far and away the most advanced car in its price class. But at that time, there was no full-size Dodge Dart or compact Dodge Lancer for you to compare when buying a new car.

"Today, in 1961, Dodge offers you two distinct sizes of automobiles that incorporate many new engineering and quality features: the full-size Dodge Dart and compact Dodge Lancer. The Dodge Dart is priced model for model with Ford and Chevrolet. Lancer is priced right down the line with Comet, Falcon and Corvair.

"Dodge engineering and convenience features are outlined on the following pages. We know you'll find them interesting to read about, and to try personally, when you visit your nearby Dodge dealer.

"Whether or not you've decided about a new car—your dependable Dodge dealer is a good man to know. He is best qualified to give your DeSoto the genuine factory-approved service it deserves. Your Dodge dealer has the trained, experienced mechanics and proper service facilities to handle all your service needs. The large, nationwide Dodge dealer organization stands ready with service when you travel, too.

"May I take this opportunity to personally invite you to visit your Dodge dealer. Meet his service manager, look over his showroom and service facilities. You may even wish to drive in a new 1961 Dodge. Remember, whether it's a new automobile . . . or dependable service . . . you'll get a great deal with Dodge.

"Sincerely,

BYRON J. NICHOLS
Vice President, Chrysler Corporation
General Manager, Dodge Division"

of a commercial tort. The District Court found that the brochure was essentially a promotional effort to increase the sale of the 1961 Dodge. The record reflects that large automobile corporations are made up of a number of divisions, each division being in competition with the others and with divisions of other automobile corporations for the automobile market. Indeed, the Plymouth division of Chrysler's enterprise, as well as divisions of other automobile corporations, could have vied for the business represented by the then current DeSoto owners in much the same manner as Dodge did. As we see it the cases cited by the majority are appropriate to our problem neither on their facts nor on the law for which they stand. They are authority for the basic proposition that there is a right to be free from *malicious and wanton* interference with a business relationship and prospective economic advantage, an act for which Buono Sales does not charge Chrysler. We thus agree with the District Court that the use of the term "best qualified" was merely puffing by the Dodge division, there being no suggestion by Buono Sales of fraud or misrepresentation in the brochure, or bad motive in its distribution. We find absent from the record evidence of any commercial tort.

For the reasons above discussed, we respectfully dissent from the majority view and would affirm the judgment of the United States District Court for the District of New Jersey.

HASTIE and SMITH, *JJ*, concur in this dissent.

Appendix C—Judgments of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,523

BUONO SALES, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 170–62)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of

the said District Court, filed April 19, 1965, be, and the same is hereby reversed on both counts and the case is remanded for entry of judgment in favor of the plaintiff on both counts and for a trial as to damages on both counts. Costs taxed in favor of appellant.

ATTEST:

IDA O. CRESKOFF
Clerk

July 14, 1966

Appendix C—Judgments of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15,520

REZZA MOTORS, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 166–62)

No. 15,521

LICCARDI MOTOR SALES, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 173–62)

Appendix C—Judgments of Court of Appeals

No. 15,522

LICCARDI MOTORS, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 169–62)

No. 15,524

ENGLEWOOD MOTORS, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 171–62)

No. 15,525

MILBURN MOTOR SALES COMPANY, a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 172–62)

Appendix C—Judgments of Court of Appeals

No. 15,526

RICHARD MOTORS, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 174–62)

No. 15,527

LABRIOLA MOTORS, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 175–62)

No. 15,528

MAIN AUTO SALES, INC., a corporation of the State of New Jersey,

Appellant

vs.

CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware

(D. C. Civil No. 176–62)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Appendix C—Judgments of Court of Appeals

Present: STALEY, *Chief Judge,* and MCLAUGHLIN, KALODNER, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges.*

JUDGMENT

This Court by order of September 23, 1965 having approved a stipulation by the parties that the judgment in the case of BUONO SALES, INC., a corporation of the State of New Jersey, Appellant vs. CHRYSLER MOTORS CORPORATION, a corporation of the State of Delaware, and CHRYSLER CORPORATION, a corporation of the State of Delaware, No. 15,523, shall be dispositive of each of the above-entitled cases, and this Court having filed an opinion and entered judgment on July 14, 1966 in that case,

It is ORDERED that the following judgment be and it hereby is entered in each of the above-entitled cases:

It is ORDERED and adjudged by this Court that the judgment of the said District Court, filed April 19, 1965, be, and the same is hereby reversed and the case is remanded for entry of judgment in favor of the plaintiff and for a trial as to damages. Costs taxed in favor of appellant.

ATTEST:

IDA O. CRESKOFF
Clerk

July 14, 1966

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IN THE

Supreme Court of the United States

October Term, 1966

No. 655

CHRYSLER MOTORS CORPORATION AND CHRYSLER CORPORATION, Corporations of the State of Delaware,

Petitioners,

v.

BUONO SALES, INC., REZZA MOTORS, INC., LICCARDI MOTORS, INC., ENGLEWOOD MOTORS, INC., MILLBURN MOTOR SALES, CO., LICCARDI MOTOR SALES, INC., RICHARD MOTORS, INC., LABRIOLA MOTORS, INC., and MAIN AUTO SALES, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

SAMUEL CAROTENUTO,
REUSSILLE, CORNWELL, MAUSNER,
CAROTENUTO & MCGANN,
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IN THE

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October Term, 1966

No. 655

CHRYSLER MOTORS CORPORATION AND CHRYSLER CORPORATION, Corporations of the State of Delaware,
Petitioners,

v.

BUONO SALES, INC., REZZA MOTORS, INC., LICCARDI MOTORS, INC., ENGLEWOOD MOTORS, INC., MILLBURN MOTOR SALES CO., LICCARDI MOTOR SALES, INC., RICHARD MOTORS, INC., LABRIOLA MOTORS, INC., and MAIN AUTO SALES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the District Court for the District of New Jersey is printed in Petitioners' Appendix A, p. App. A 1 and is reported in 239 F. Supp. 839. The opinion of the Court of Appeals for the Third Circuit is printed in Petitioners' Appendix B, p. App. B 1 and is reported in 363 F. 2d 43.

Questions Presented

1. The Court of Appeals held that the contract between the parties was clear, that there was no need for extrinsic testimony, and that it did not give Chrysler the right to discontinue production of the DeSoto passenger automobile, and that in so doing, Chrysler breached the agreement.

The first question presented is whether or not there is a conflict between the law of the State of Michigan and the decision of the Court of Appeals.

2. The Court of Appeals also held that the mailing of a promotional brochure by the petitioner to all respondents' DeSoto owner customers announcing its discontinuance of DeSoto, and that the "dependable" Dodge dealer "is best qualified to give your DeSoto the genuine factory approved service it deserves," was a tortious interference with respondents' business.

The second question presented is whether or not the Court of Appeals correctly defined and applied the law of the State of New Jersey as to what constitutes a tortious interference with a business relationship.

3. The petitioner makes repeated references to "more than 1600 dealers situated comparably to respondents", and that the petitioner may be involved in "numerous" similar dealer suits, thus cluttering up already congested court dockets.

The third question presented is whether the United States Supreme Court should review the decision of a Court of Appeals where there is no conflict with applicable state law merely because petitioner may be confronted with additional similar law suits.

Statement

Petitioner manufactured and distributed DeSoto passenger automobiles. Respondents were retail dealers of that automobile. Respondents operated under a standard franchise agreement with petitioner, known as a "Direct Dealer Agreement" which was drawn by petitioner and on several occasions over the years revised by petitioner.

The Direct Dealer Agreement is an elaborate, carefully drawn instrument encompassing twenty-two (22) pages which painstakingly sets forth in detail the obligations and liabilities of the parties. It was drawn by petitioner to protect it in every conceivable contingency except one—the right to discontinue production of the DeSoto passenger automobile. As the Court of Appeals stated, in its opinion, nothing would have been easier for the petitioner than to state so in the agreement (Pet. App. B 3). Furthermore, the agreement did not provide for discontinuance of production based on a decline in sales, or if respondents were given a new or another passenger car to sell.

On or about November 18th, 1960, petitioner discontinued production of the DeSoto passenger automobile, notifying respondents by form telegram, followed by a form letter (P. App. 99a-102a).

In February, 1962, respondents instituted suit against petitioner in the United States District Court for the District of New Jersey.

At the trial, respondents introduced the "Direct Dealer Agreement" and the communications from petitioner announcing the discontinuance of DeSoto production. The agreement was complete in itself and contained a statement that it was the "entire agreement between the parties" (Para. 5, "Direct Dealer Agreement" P. App. 21a).

Nevertheless, the District Court received extrinsic evidence and held that it was satisfied from "a consideration

of the entire agreement, in light of the evidence adduced at the trial" that petitioner was justified in discontinuing production of the DeSoto and that "no liability attached to it by reason of such action" (Pet. App. A 7).

In addition, the District Court held that the promotional brochure mailed by petitioner shortly after the demise of DeSoto to all respondents' DeSoto owner customers was not a tortious interference with respondents' business.

The matter was appealed to the Third Circuit Court of Appeals, and initially argued before three Judges. Prior to a decision, however, it was set down, on the Court's own motion, for reargument before the Court sitting *en banc*. The Court of Appeals reversed, holding that the contract was clear and that the petitioner by discontinuing production of the DeSoto had breached the contract. On the tortious interference count, the Court of Appeals held that the petitioner's carefully planned method of enticing respondents' DeSoto customers away from respondents and to petitioner's Dodge dealers constituted a tortious interference with respondents' business.

Argument

Petitioner has shown absolutely no reasons which would justify the issuance of the discretionary Writ of Certiorari. Rule 19(1)(b) of this Court provides in pertinent part:

> "1. A review on Writ of Certiorari is *not a matter of right*, but of sound judicial discretion, and will be granted only where there are *special* and *important* reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered: . . . (b) Where a court of appeals . . . has decided an *important state* or territorial question in a way *in conflict* with applicable state or territorial laws; . . ." (emphasis ours)

It can hardly be urged that "special and important reasons" are present here, for it is readily apparent that this matter presents nothing more than a simple contract case, albeit one of the parties is engaged in a business of nationwide scope. Petitioner's argument seems to rest primarily on the nationwide scope of petitioner's business, but such an argument does not come within the reasoning clearly expressed in Rule 19(1)(b), *supra*, especially where there is no confusion or conflict with regard to applicable State law. The contract principles expressed in *F. H. McClintock Co.* v. *Truxell Sales & Service*, 297 Mich. 284, 297 N. W. 493 (1941), are not at variance or in conflict with the decision of the Court of Appeals. If a contract is clear and unambiguous, the intention of the parties must be garnered from the instrument itself, and the Court may not go beyond the four corners of the instrument. *Sheldon-Seatz* v. *Coles*, 319 Mich. 401, 29 N. W. 2d 832 (1947). In fact, it is clear that the Michigan Supreme Court and the Court of Appeals applied this principle of general contract law in both cases.

The difference in the result of the two cases is clearly a consequence of a sharp factual diversity. In the instant case we are dealing with an agreement between the manufacturer and the retailer; in *McClintock* it was an agreement between a retailer or direct dealer and a second retailer or associate dealer. In *McClintock*, the agreements contained a specific and precise termination date; in the instant case, the agreement states that "this agreement does not have an expiration date" (Para. 5, "Direct Dealer Agreement" P. App. 21a). In *McClintock* there was an absolute right of termination, for any or no reason; in the instant case, there was no such absolute right. Furthermore, petitioner cites supposedly comparable language in the two contracts, but this is inapposite since, in considering the specific contract language in *McClintock* the Michigan Supreme Court determined that that language did not

refer to the issue of discontinuance or termination, which is the vital issue here.

It is respectfully submitted that the decision of the Court of Appeals is not in conflict with the decision of the Michigan Supreme Court, and the *McClintock* case has no application to the admitted facts in the instant case.

Petitioner further contends and makes repeated references to "more than 1600 dealers situated comparably to respondents" and that it will be subjected to numerous similar law suits. Petitioner fails to indicate that six years have elapsed since the breach of this agreement, with only a few law suits instituted to date out of 1600 dealers. Petitioner fails to demonstrate why the possibility of "numerous" suits, which respondents claim is most improbable at this late date, should without more, be the basis for the granting of the Writ of Certiorari.

The agreement as drawn by the petitioner, did not provide for the discontinuance of the DeSoto. To this date, petitioner has made no effort to amend the agreement to so provide. Petitioner seeks the granting of the Writ to attempt to rectify its own omission in draftsmanship, and it is respectfully submitted the mere possibility (at this late date of numerous law suits) is insufficient to allow the Writ of Certiorari.

Petitioner further contends that the determination by the Court of Appeals on the tortious interference count in the complaint is in conflict with applicable New Jersey law. Petitioner has correctly stated that New Jersey law permits one man to claim that his product is superior to his competitors, commonly known as "puffing". However, the facts in the instant case indicate a situation which is more aggravated than "puffing". Petitioner admittedly mailed a promotional brochure shortly after DeSoto was discontinued, to all DeSoto passenger car owners, including those customers of the respondent dealers, announcing the discon-

ance of DeSoto and asserting that the "dependable" Dodge dealer is "best qualified to give your DeSoto the factory approved service it deserves". The general public, and more particularly customers of respondent dealers, was told by the manufacturer of their automobile that the Dodge dealer was best qualified to service his DeSoto; the obvious conclusion being that the respondents were no longer so qualified. This, despite the fact that a large part of respondents' business was service of DeSotos, even though future production of the car was discontinued. It is respectfully submitted that this is far more than the "puffing" which is permitted by New Jersey law.

Furthermore, New Jersey law does not require that such action be malicious, wanton, false or fraudulent, as alleged by petitioner. All that need be shown is that it was an intentional doing without justification or excuse and malice, in its technical sense, is inferred. In the case of *Louis Kamm, Inc.* v. *Flink,* 113 N. J. L. 582, 175A. 62 (E & A 1934), the Court stated at page 588:

> "While ill will toward a person is malice in its common acceptation or popular sense, in the technical, legal sense it is the intentional doing of a wrongful act without justification or excuse."

See also, the case of *Middlesex Contract etc. Corp.* v. *Carteret Industrial Association,* 37 N. J. 507, 181 A. 2d 774, (1962), at page 518 where the Court states:

> "Plaintiffs suggest that defendants are not entitled to the comfort of this privilege because their actions were 'maliciously' prompted. They use that term in the ordinary parlance, meaning ill will, and not in the technical sense wherein it is defined as 'the intentional doing of a wrongful act without justification or excuse.' Louis Kamm, Inc. v. Flink, supra, at p. 588 . . ."

It is respectfully submitted that the decision of the Court of Appeals is not in conflict with applicable New Jersey law.

Lastly, petitioner seeks a reversal of the tortious interference issue by citing a United States Supreme Court policy, which gives special weight to opinions of Federal Courts when the Judges are from the bar of the state whose law is at issue. Petitioner suggests that this policy, without more, could be the basis for reversal, but cites no authority to support this contention. The fact is that in one of the cases cited by petitioner, *Ragan* v. *Merchants Transfers & Warehouse Co.*, 337 U. S. 530, 534 (1949), the United States Supreme Court specifically stated that it would accept the determination of local law by the Court of Appeals in an opinion written by a Judge who was from the bar of the state whose law was at issue. The Court stated at page 534:

> "It is argued that the Kansas statute in question is not an integral part of the Kansas Statute of Limitations. But the Court of Appeals on a careful canvass of Kansas law, in an opinion by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. We ordinarily accept the determination of local law by the Court of Appeals (see *Huddleston* v. *Dwyer*, 332 U. S. 232, 237, 88 L. Ed. 1246, 1249, 64 S. Ct. 1015), and we will not disturb it here."

In the instant case, the Court of Appeals opinion was written by Judge McLaughlin, a distinguished member of the New Jersey Bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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